Supreme Court, U. S.
FILED
FEB 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 78-1296

VITO GIACALONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Index to Authorities	iii
Opinion Below	2
Questions Presented	2
Statute Involved	4
Statement of the Case	4
Reasons for Granting the Writ	8

I.

The decision of the Court of Appeals is in conflict with prior decisions of that court, of this Court, and with other Circuit Courts of Appeals, and impermissibly carves out a new *ad hoc* exception to the Warrant Clause of the Fourth Amendment, sanctioning warrantless seizures of automobiles parked in private enclaves based on the mere anticipation of the subsequent issuance of a warrant, and sanctions the deliberate bypass of the warrant-issuing process by law enforcement officers. . . 8

II.

The decision of the Court of Appeals is in conflict with the decisions of other circuits, and improperly validated clearly improper interference by the trial court in the jury's delibera-

Page

tions; the trial court's conduct, and the Court of Appeals' validation thereof, bespeak a need for guidance from this Court on the question of the circumstances under which, and to what lengths, supplemental jury instructions are proper. 25

III.

The decision of the Court of Appeals is in direct conflict with the principles established by this Court's decision in *Marshall* v *United States*, 360 U.S. 310 (1959), in that the Court of Appeals erroneously affirmed the trial judge's denial of Petitioner's challenges for cause to trial jurors who admitted both unfavorable attitudes toward Petitioner, and the possession of extrajudicially-acquired facts about specific allegedly criminal acts of the Petitioner, unconnected with the charge for which he was on trial, and about which proof would not have been admissible. 39

Conclusion 46

Appendix A — Order of Sixth Circuit Court of Appeals Affirming Petitioner's Conviction A1

Appendix B — Order of Sixth Circuit Court of Appeals Denying Petition for Rehearing A21

INDEX TO AUTHORITIES

Cases: Page

Allen v. United States, 164 US 492 (1896) 31,36

Arrington v. United States, 22 Cr L Rptr 2411 (CA DC 1978) 14

Bollenbach v. United States, 326 US 607, 612 (1945) 31,33

CAB v. United Airlines, Inc., 542 F2d 394 (7th Cir 1976) 16

Carroll v. United States, 267 US 132 (1925) 13,15

Chimel v. California, 395 US 752 (1969) 13

Coolidge v. New Hampshire, 403 US 443, 461-462 (1971) 13,15,16,22

DiBella v. United States, 369 US 121, 82 SCt 654 (1962) 24

Ervin v. Dowd, 366 US 717 (1961) 42

Fifth Avenue Peace Parade Committee v. Hoover, 327 F Supp 238 (SDNY 1971) 24

Fixel v. Wainwright, 492 F2d 480 (5th Cir 1974) .. 16

Jenkins v. United States, 380 US 445, 446, 85 SCt 1059 (1965) 26

Page

Katz v. United States, 389 US 347, 356-357 (1967) 12,15,16

Kroehler v. Scott, 391 F Supp 1114 (ED Pa 1975) .. 16

Marshall v. United States, 360 US 310 (1959) 39,43,44,46

Michaelson v. United States, 335 US 469, 475, 69 SCt 213, 218, 93 L Ed 168 (1948) 43,44

In re Murchison, 349 US 133, 136 (1955) 42

Niro v. United States, 388 F2d 535, 538 (CA 1 1968) 17

Patterson v. Colorado, 205 US 454, 462 (1907) 41

Perial Amusement Corp v. Morse, 482 F2d 515 (2d Cir 1973) 23

Powell v. United States, 347 F2d 156, 158 (CA 9 1965) 34

Preston v. United States, 376 US 364 (1964) 13

Shadwick v. City of Tampa, 407 US 345 (1972) ... 22

Shields v. United States, 273 US 583 (1957) 26

Silverthorne v. United States, 400 F2d 627, 637 (CA 9 1968) 42

South Dakota v. Opperman, 428 US 364 (1976) ... 13

Tennant v. United States, 407 F2d 52, 53 (CA 9 1969) 34

Terry v. Ohio, 392 US 1 (1968) 12

United States v. Barnhill, 305 F2d 164, 165 (CA 6 1962) 30

Page

United States v. Bass, 425 F2d 161, 163 (CA 7 1970) 34

United States v. Berkowitz, 429 F2d 921, 924 (CA 1 1970) 11

United States v. Burley, 460 F2d 998 (CA 3 1972) . 36

United States v. Calandra, 414 US 338 (1974) 22

United States v. Carter, 491 F2d 625, 633-634 (CA 5 1974) 32,33

United States v. Chuke, 554 F2d 260 (CA 6 1977) 18,19

United States v. Contreras, 463 F2d 773 (CA 9 1972) 38

United States v. Dunnings, 425 F2d 836 (2d Cir 1969) cert denied 397 US 1002 22

United States v. Harris, 391 F2d 348, 354 (CA 6 1968) 36

United States v. Heisman, 503 F2d 1284 (8th Cir 1974) 16

United States v. Jackson, 533 F2d 314, 319 (CA 6 1976) 14

United States v. Jacobs, 513 F2d 564 (9th Cir 1974) 23

United States v. Jeffers, 342 US 48, 51 (1951) 13

United States v. McCormick, 502 F2d 281, 284, 287 (CA 9 1974) 14,16

United States v. Miller, 546 F2d 320, 324 (CA 9 1976) 33

Page

United States v. Murrie, 534 F2d 695, 697 (CA 6 1976) 12

United States v. Ortiz, 422 US 891, 95 SCt 2585 (1975) 16

United States v. Payne, 429 F2d 169, 172 (CA 9 1970) 14,17

United States v. Petersen, 513 F2d 1133, 1136 (CA 9 1975) 28

United States v. Pruett, 551 F2d 1365 (CA 5 1977) 17

United States v. Scheffer, 463 F2d 567, 574-575 (CA 5 1972) 17

United States v. Scott, 547 F2d 334 (CA 6 1978) .. 31

United States v. Seawell, 550 F2d 1159, 1163 (CA 9 1977) 26,37

United States v. Shirley, 435 F2d 1076, 1078 (CA 7 1970) 35

United States v. Taylor, 530 F2d 49, 51 (CA 5 1976) 36

United States v. Thomas, 449 F2d 1177, 1181 (CA DC 1971) (en banc) 35

United States v. Thompson, 409 F2d 113 (CA 6 1969) 12

United States v. Watson, 423 US 411, 428, 96 SCt 820 (1976) 12

United States v. Williams, — F2d —, 22 Cr L Rptr 2521, 2522 (CA 5 2-27-78) 44,45,46

Warden v. Hayden, 387 US 294, 87 SCt 1642, 18 L Ed 2d 782 (1967) 14

Page

Other Authorities:

Federal Rules of Criminal Procedure,

Rule 12 21

Rule 30 25,31,34

Rule 41 21

Rule 41(e) 24

Rule 43 25

Notes of the Advisory Committee on Rules — 1972 Amendment 23

"On Instructing Deadlocked Juries", 78 Yale Law Journal 100, 139 (1968) 36

18 USC §1955 4,8

29 USC §782 16

United States Constitution,

Fourth Amendment 3,12,15,17,19,21

Fifth Amendment 21

Sixth Amendment 21

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NO.

VITO GIACALONE,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Vito Giacalone, by and through his attorney, N. C. Deday LaRene, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of 18 USC §1202(a) (Appendix), filed December 18, 1978, and its Order denying his Petition for Rehearing, and Suggestion for Reconsideration En Banc, filed January 22, 1979.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed December 18, 1978, affirming Petitioner's conviction, is reprinted in full herein as Appendix A to this Petition. The Order denying the Petitioner's Petition for Rehearing is reprinted in full as Appendix B hereto. Neither of these Orders has as yet been published.

JURISDICTION

The Orders appealed from were filed December 18, 1978 and January 22, 1979. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I

Was the firearm upon which the Petitioner's prosecution was founded obtained as a result of an illegal search and seizure because:

A. The Government delayed unreasonably in securing a search warrant, and deliberately bypassed magisterial review of its actions through the warrant-issuing process?

B. The Magistrate who ultimately issued a search warrant for Petitioner's car, once it had been seized without a warrant,

erroneously refused to allow Petitioner's counsel to be heard in opposition to the issuance of the warrant?

C. The Search Warrant which was ultimately issued was itself the product of, and fatally based upon the fruits of an initial warrantless seizure and detention of the Petitioner's automobile the previous day?

D. The warrantless seizure of the Petitioner's automobile was not justified under any known exception to the Warrant Clause of the Fourth Amendment, but only upon the anticipation by the seizing officers of the subsequent issuance of a warrant?

II

Did the trial court improperly coerce the jury verdict, under the standards guiding and limiting a federal trial judge's interference with a jury's deliberations?

III

Was the Petitioner denied the proper exercise of his rights to a fair and impartial jury by the trial court's denial of his challenges for cause to jurors who believed that he had a bad reputation in the community, assumed that he was a professional criminal, and had independent, extrajudicially-acquired personal knowledge of what appeared to be illegal transactions, none of which would have been provable by the Government?

STATUTE INVOLVED

The Statute under which Petitioner was convicted, 18 U.S.C. §1202(a) (Appendix), provides, in pertinent part, as follows:

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony,
>
> * * *
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On March 29, 1977 the Petitioner, Vito Giacalone, was arrested by Special Agents of the Federal Bureau of Investigation, executing a Warrant of Arrest premised upon the return of an indictment charging him with violation of 18 USC §1955.[1] His car was seized by the agents, without authority of a warrant, and removed to FBI headquarters in Detroit, where it was maintained until the next day. On March 30, 1977, a search warrant was procured by the Government, and the automobile was searched thereunder.

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[1] That prosecution, *United States v. Vito Giacalone, et al.*, was subsequently tried in the United States District Court for the Eastern District of Michigan, under docket number 7-80449. The defendant Vito Giacalone was acquitted by the jury.

In the course of searching the Petitioner's automobile, the agents discovered a "secret compartment" concealed within the dashboard, between the ashtray and the glove compartment, on the lower portion of the dashboard. Within that compartment was discovered .32 caliber Smith and Wesson revolver, resting on a white tissue, an envelope containing twenty three rounds of .32 caliber ammunition, and a piece of note paper with writing appearing to be personal notes on it. The compartment was so devised that it was opened by a solenoid which was activated by a button located on the bottom of the dashboard to the left of the steering column.

Petitioner was charged, under the provisions of 18 USC §1202(a) (1) (Appendix) in a one count Indictment, with having been a previously convicted felon and knowingly receiving or possessing in and affecting commerce the Smith and Wesson pistol discovered in his automobile.

After the Court denied his Motion to Suppress the pistol and other contents of his automobile on Fourth Amendment grounds, Petitioner went to trial before the Honorable Charles W. Joiner, and a jury, on July 13, 1977.

The Government presented witnesses who, generally, established that the pistol in question had indeed travelled in interstate commerce prior to its discovery in the Petitioner's automobile. The Government did not prove when or where the Petitioner may have received the firearm; and only nexus between Petitioner and the gun was as of the time of its seizure from his automobile.

However, testimony establishing both the Petitioner's ownership of the automobile at the time of its search and seizure, and his previous conviction of a felony was stipulated to.

The defense did not really challenge the sufficiency of the Government's proofs as to any elements of the offense charged except that of "knowing possession or receipt." With respect to that question, the defense called a series of witnesses who did not know the Petitioner, but who had been in his car at times when it was driven by three other people when the Petitioner was not there. It was the theory of the defense that any one of these three people might have, and in fact did, place the gun in the compartment, and that the Petitioner need not have been responsible for the placing of the gun there, or have been in knowing possession of it, on the day he was arrested. To this end, the defense also called as a witness a Detroit police officer who was on duty at the Detroit Police Auto-Pound on the afternoon of March 29, 1977, shortly after the Petitioner's arrest; he testified that shortly after hearing about Vito Giacalone's arrest on the radio, a person identifying himself as one of the three people who had driven Petitioner's vehicle came to the Pound and asked to get some personal property of his out of Mr. Giacalone's car; since the automobile was not in the possession of the Detroit Police Department, the officer called the FBI, who had the car, and was told to direct the person inquiring to the United States Attorney's Office.

It was, quite clearly, the theory of the Petitioner, and the only theory of the Petitioner, that someone other than he could have placed the gun in the compartment

in the Petitioner's car, and that the incident at the auto pound on the day in question suggested at least a reasonable doubt as to whether or not the Petitioner himself had actual or constructive possession of the gun on the day in question.

The jury began its deliberations in the morning of July 19, 1977. Those deliberations continued uninterrupted through the afternoon of July 19 and through to the afternoon of July 20, when the jury sent a note requesting that the testimony of the FBI agents who had seized the car, the defense witnesses, and the one government rebuttal witness who gave testimony regarding the possession of the Petitioner's car by another be read back. Because of logistical problems, this was not done until the morning of July 21; after the testimony was re-read, the jury continued to deliberate and on the afternoon of July 21 announced that it was unable to reach a verdict.

Supplemental instructions were given by the Court, over the objections of the Petitioner and within an hour thereafter, the jury which had deliberated some 20 hours up to that point, returned a verdict of guilty.

On September 6, 1977, Petitioner was sentenced to the maximum term of incarceration permitted under the statute — two years — and a Five Thousand Dollar ($5,000.00) committed fine was imposed as well.

Petitioner appealed his conviction and sentence to the Sixth Circuit Court of Appeals as a matter of right. On December 18, 1978, a panel of that court affirmed his conviction. A petition for rehearing and suggestion of the appropriateness of reconsideration *en banc* was duly filed, and denied by the Sixth Circuit on January 22, 1979.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in conflict with prior decisions of that court, of this Court, and with other Circuit Courts of Appeals, and impermissibly carves out a new *ad hoc* exception to the Warrant Clause of the Fourth Amendment, sanctioning warrantless seizures of automobiles parked in private enclaves based on the mere anticipation of the subsequent issuance of a warrant, and sanctions the deliberate bypass of the warrant-issuing process by law enforcement officers.

The Factual Background

For more than a year prior to Petitioner's arrest on March 29, 1977, the Federal Bureau of Investigation and the Detroit Strike Force had been investigating his alleged involvement with an illegal gambling business involving numbers gambling in the City of Detroit. Sometime prior to March 29, 1977, it had been determined that an Indictment would be sought against, among others, the Petitioner, for violation of 18 USC §1955 (the Illegal Gambling Business Statute), and also that warrants for the seizure of the prospective Petitioners' cars would also be sought, pursuant to 18 USC §1955(d).

Shortly after the Petitioner's arrest, and surrounding of his car by the FBI agents, his companion was seen to re-enter the private club from whence they had come. One of the agents, upon entering the club shortly thereafter, heard the Petitioner's companion speaking on the telephone, saying that "they" had the car

"surrounded," and expressing dismay that "they" might "find the goddamned thing in there."

That information, together with information allegedly obtained the following day from an informant that he had overheard the companion say to Petitioner's son, who had come to the scene of the Petitioner's arrest shortly thereafter, and been refused permission by the agents to take the Petitioner's car, that "we've got to get the gun out of there right now," was incorporated in an affidavit submitted the next day in support of a search warrant which was in fact issued.

When the Petitioner was arrested on March 29, 1977, under the authority of the Warrant of Arrest issued upon the return of the Grand Jury Indictment in the gambling case, the seizure warrant for his car had been presented to the same United States Magistrate who had issued the Warrant of Arrest, but it either had been at that point denied, or had not yet been acted on as of the time of Petitioner's arrest at 4:41 p.m.

The Petitioner was arrested at the Southfield Athletic Club, in Southfield, a suburb of the City of Detroit — at the time of his arrest, the FBI had arranged a "seizure team," which was on hand and ready to seize the car. At the Evidentiary Hearing that was held in connection with Petitioner's Motion to Suppress, the supervising Special Agent on the scene of the arrest testified that he made the decision, at the time of the arrest, to detain the vehicle at the scene based upon his assumption that the Seizure Warrants under §1955(d) were to be issued.

The Petitioner was arrested after he left the premises of the Southfield Athletic Club and approached his car, which was parked in a segregated section of the

parking area which surrounded the building in which the Club was located, and to which access could only be gained through the employment of an electronically keyed card, available only to members of the Southfield Athletic Club; testimony established that the Petitioner was a member of the Southfield Athletic Club, and had indeed paid an additional fee for the privilege of parking in this segregated portion of the parking lot.

The basic information upon which the search warrant affidavit was premised came from informant information regarding the presence of a secret compartment in the Petitioner's car which had been given to the FBI by the informant (described as "FBI-1" in the Affidavit) some 3 months before the Petitioner's arrest on March 29, 1977.

Prior to March 29, a conscious decision had been made by agents of the FBI not to seek a Search Warrant for the gun about which they had information. According to the agents, this decision was based both upon the thought that the information was of such a character that to disclose it in the context of a Search Warrant Affidavit would "pinpoint" the informant, and also that it would not have been sufficient to justify the issuance of a Warrant; however, the agent who was dealing with the informant acknowledged that at no point did the FBI agents consult anyone outside the FBI — that is, they did not apparently seek the opinion of an attorney.

A.

The Government delayed unreasonably in securing a search warrant, and deliberately bypassed magesterial review of its actions through the warrant-issuing process.

Nothing can be clearer than that when the agents assumed dominion over the car at the time of the Petitioner's arrest, and resolved to detain it "pending the issuance of the seizure warrants," they were in fact, for constitutional purposes, effecting a "seizure" of the vehicle then and there. *See, e.g., United States v. Berkowitz*, 429 F2d 921, 924 (CA 1 1970). This point in time is analytically significant because clearly the overheard statements of Petitioner's companion were the products of this initial FBI action.

Nothing could be clearer than that the conduct of Petitioner's companion in making the telephone calls which the affiant to the Search Warrant described in his Affidavit to the effect that the FBI had the car surrounded and that they might "find that goddamned thing in there" can be seen as nothing but the direct product of the warrantless seizure and detention of the automobile. Indeed, the "exigency" relied upon by the Government to justify its warrantless detention — that the friends and relatives of the Petitioner were seeking to remove the car — was premised upon the fact of the FBI's detention of the automobile itself, and the attempts of the Petitioner's son to secure custody of the car. Moreover, it was conceded by the Government at the Evidentiary Hearing that the further informant

information obtained the next day from "FBI-2", and which was integral to the Search Warrant Affidavit's showing of probable cause was "at least in part an out-growth of the seizure detention" of the automobile on March 29.

As Mr. Justice Powell indicated, concurring in *United States v. Watson*, 423 US 411, 428, 96 SCt 820 (1976), "The Fourth Amendment speaks equally to both searches and seizures." Accordingly, it seems clear enough that where the issue is the validity of a search or seizure without a search warrant, the burden is on the Government to justify the propriety of the warrantless action. *United States v. Murrie*, 534 F2d 695, 697, (CA 6 1976), *United States v. Thompson*, 409 F2d 113 (CA 6 1969).

Searches or seizures conducted without the judicial process of a warrant, without prior approval by a magistrate, are *per se* unreasonably under the Fourth Amendment subject only to a few well-delineated and specifically established exceptions which are jealously and carefully drawn. *Katz v. United States*, 389 US 347, 356-357 (1967). The Sixth Circuit's affirmance of the District Court's decision upholding the seizure and search of the Petitioner's car ignores this well entrenched principle of Federal constitutional law.

Wherever practicable, the police must obtain advance, judicial approval of a search through the warrant procedure unless an established exception applies. *Terry v. Ohio*, 392 US 1 (1968).

The warrant requirement serves two distinct constitutional protections: a careful prior determination of necessity by a neutral and detached magistrate

precludes intrusions not scrutinized for probable cause; and those searches not deemed necessary should be as limited as possible. *Coolidge v. New Hampshire*, 403 US 443 (1971). Thus, the burden of justifying a warrantless search is on those seeking an exception from the general rule. *United States v. Jeffers*, 342 US 48, 51 (1951).

In the circumstances of this case, the only arguably relevant, recognized exception to the warrant requirement is the moving automobile exception. *See Carroll v. United States*, 267 US 132 (1925). The seizure and search cannot be justified as incident to the defendant's arrest since the contents of the car were well beyond his immediate control, both at and subsequent to his arrest and removal from the scene. *See Chimel v. California*, 395 US 752 (1969) and *Preston v. United States*, 376 US 364 (1964). Nor can the seizure be justified as a part of some inventory procedure as in *South Dakota v. Opperman*, 428 US 364 (1976) in which an automobile was seized solely via a legitimate impoundment after multiple parking violations. No such justification has been asserted; nor could it since it is clear from the testimony that the purpose of the seizure and search was to obtain evidence and not to protect the defendant's property.

Although the Sixth Circuit held that the case facts "fully suggest the propriety of the exception to the warrant requirement in *Carroll v. United States*, 267 US 132 (1925)," the Court's opinion nowhere explicitly states that the case is controlled by the *Carroll* exception. Rather, the opinion carefully skirts such a proposition. Well it might, for heretofore *Carroll* has only been held to contemplate a vehicle moving on an open highway.

See, e.g., United States v. McCormick, 502 F2d 281, 287 (CA 9 1974); *United States v. Payne,* 429 F2d 169, 172 (CA 9 1970).

What the Sixth Circuit's opinion does, quite clearly, is to carve out a new exception to the warrant requirement — allowing the temporary detention of a stationary automobile pending the issuance of a Search Warrant — in an ad hoc adjudication of "reasonableness." This is precisely the sort of constitutional excursion which has been repeatedly condemned by the Courts, notably, and recently by the District of Columbia Circuit in *Arrington v. United States,* 22 CrL Rptr 2411 (CA DC 1978) in which that Court strongly rejected a Government contention that the warrantless removal of an arrested traffic offender's automobile to the police station, and the subsequent inspection and opening of a paper bag found therein should be justified as reasonable as an "invitation to venture forth on the uncharted sea of ad hoc adjudications of constitutional reasonableness." 24 CrLRptr *supra.*

The Sixth Circuit's decision is in marked conflict not only with decisions such as *United States v. McCormick, supra,* and *United States v. Payne, supra,* but with its own jurisprudence, in which it has steadfastly clung to the Warrant Clause. Thus, in *United States v. Jackson,* 533 F2d 314, 319 (CA 6 1976), the court wrote that "belief, however well founded, that articles are concealed inside a dwelling house, does not justify a search without a warrant," and struck down the warrantless entry into a dwelling unit which was unjustified by the level of exigency which had been held by this Court to permit warantless entries in *Warden v. Hayden,* 387 US 294, 87 SCt 1642, 18 LEd 2d 782 (1967).

The facts of this case fall squarely under the holding and rationale of *Coolidge v. New Hampshire, supra.* There this Court struck down the seizure and search, without a valid warrant, of a car which was parked in the defendant's driveway. The Court in *Coolidge* cautioned that the word "automobile" was not a talisman in whose presence the Fourth Amendment fades away. 403 US at 461-462.

In *Coolidge,* the defendant's car was parked in his driveway, from which it was seized without a valid warrant. This Court held that such a seizure would not be sustained absent a proper judicial authorization, since the *Carroll* "automobile exception" to the warrant requirement contemplates a vehicle moving on an open highway.

Although subsequent Supreme Court decisions have upheld warrantless seizures of automobiles in a variety of situations, no decision has significantly undercut the precedential effect of *Coolidge,* and in no case has *any* court upheld the warrantless seizure of an automobile when the automobile was not either abandoned or parked on a public thoroughfare or the like.

The Supreme Court's analysis has proceeded on a "privacy" analysis. Adopting this analysis, it is clear that the Petitioner's expectations of privacy, in the case at bar, were at least as reasonable and legitimate as those vindicated in *Coolidge.* The cases have sustained a persons' right to expect privacy and thus protection from unwarranted governmental intrusion in a variety of circumstances. *Katz v. United States, supra,* initiated this analysis by holding that one who made a telephone call from a public booth had a legitimate expectation that his conversation would not be electronically

monitored. Following *Katz*, courts in a broad variety of circumstances have found a reasonable and legitimate expectation of privacy. *See Fixel v. Wainwright*, 492 F2d 480 (5th Cir 1974) (yard behind four-unit apartment); *United States v. Heisman*, 503 F2d 1284 (8th Cir 1974) (lease commercial building); *CAB v. United Airlines, Inc.*, 542 F2d 394 (7th Cir 1976) (regulated carrier); and *Kroehler v. Scott*, 391 F Supp 1114 (ED Pa 1975) (toilet stalls in public restroom).

Even though the privacy we have a right to expect in our cars is different and perhaps more limited than that of our homes, it is nevertheless clear that there is a reasonable expectation of privacy in one's automobile. "A search, even of an automobile, is a substantial invasion of privacy. . ." *United States v. Ortiz*, 422 US 891, 95 SCt 2585 (1975). This should be particularly true when the subsequent search involves such an invasive intrusion into a "hidden" compartment in the car's dashboard, which was clearly designed for private purposes. Moreover, the seizure of a locked car from the restricted and private parking lot of a private club seems at least as invasive into private areas as the four cases cited above.

In addition to *Coolidge*, other federal cases have struck down warrantless automobile circumstances under situations in many respects more exigent than the present one. In *United States v. McCormick*, 502 F2d 281, 284 (9th Cir 1974), the Court rejected the justification that the vehicle was impounded under 29 USC §782, a forfeiture statute, since the statute could not validate a warrantless seizure unless a recognized exception to the warrant requirement was established. Therefore, the warrantless seizure of the car from the defendant's

driveway was improper. In *United States v. Payne, supra*, a warrantless search of a vehicle parked near the Petitioner's campsite in a national park required exclusion of the evidence found in the car. And, in the recent case of *United States v. Pruett*, 551 F2d 1365 (CA 5, 1977) the search of the Petitioner's automobile while it was parked outside of his residence was held by the Fifth Circuit Court of Appeals to be a violation of the Fourth Amendment.

It is important to note that the status of the property on which the agents proceeded to detain and seize the Petitioner's automobile, and the Petitioner's interest in that property, is qualitatively different both from an automobile moving on the open highway and one parked on a public street.

In order to prevail on the question of the propriety of a warrantless seizure, the Government must be required to show that some exigency justifies action without the benefit of prior judicial approval, and, moreover, that that exigency was not created by the Government's own deliberate actions or failure to act. *Niro v. United States*, 388 F2d 535, 538 (CA 1, 1968), *United States v. Scheffer*, 463 F2d 567, 574-575 (CA 5, 1972).

The fact that the Government had not procured the contemplated §1955(d) Seizure Warrant at the time of the Petitioner's arrest, was not due to any action on the part of the Petitioner, but rather to the timing of a process which was wholly and completely within the control of the Government. Quite simply, it is the position of the Petitioner that the Government cannot create its own exigencies and then exploit them to do without a warrant what it could not otherwise. The Government in the case at bar could have presented its

application for a Seizure Warrant at an earlier time, or could have waited to execute the arrest warrants (the testimony was that they had had the Petitioner under surveillance since approximately 8:00 that morning, waiting to effect his arrest) until the Seizure Warrants had been acted on, or otherwise have timed their conduct so that it would not have been "necessary" for them to detain the automobile absent judicial authorizations therefor. Indeed, when the Petitioner was taken from the Southfield Athletic Club, he was taken to the United States Magistrate who had already declined to issue the Seizure Warrant. The Government could, at the very least, it appears, *then* sought a Search Warrant for the Petitioner's car if they had then had probable cause. However, at no point did the Government in its arrogance seek the prior authorization of a judicial officer either for the seizure or detention of the automobile in the parking lot of the Southfield Athletic Club, or for its removal therefrom or detention in the FBI parking lot downtown.

The Government's deliberate by-pass of the warrant issuing process at that point must render the subsequent warrantless seizure (even if it were otherwise proper — which of course Petitioner contends it was not) improper. The Sixth Circuit's own decision in *United States v. Chuke*, 554 F2d 260 (CA 6, 1977) is instructive in this regard. In *Chuke*, this Court held, in pertinent part, as follows:

> Where law enforcement officers have squandered an overt opportunity to obtain a warrant antecedent to an otherwise acceptable search (justified by exigent circumstances or incident to a valid arrest), there must be a showing of compelling "countervailing factors" to sustain

> the constitutionality of the suspect intrusion . . . We believe that, if a defendant's allegation of deliberate bypass of a warrant is supported by a finding that a realistic opportunity existed to procure one, as in this case, the Government must come forward with objective evidence tending to justify this deviation from normal police procedure. Subjective good faith on the part of the authorities cannot suffice as a complete defense if we are to honor the principle that warrantless searches are per se unreasonable under the Fourth Amendment . . . We must satisfy ourselves from the facts that the officers conducted themselves reasonably under all of the circumstances and did not gratuitously usurp the role of the impartial magistrate.

554 F2d *supra* at 263-264 (citations omitted)

There is no question but that at the time the informant information was received on January 3, 1977, that information would have constituted probable cause, because of its staleness.) Thus, it is clear that, to use the language of the Court in *Chuke*, the Government possessed in January 1977 a "realistic opportunity" to procure a Search Warrant, which it deliberately bypassed.

It makes no difference, Petitioner submits, whether the agents themselves *thought* probable cause existed since the standard should be an objective one. While it is true that the agents testified in the instant case that they did not believe that probable cause existed, they also indicated that they did not take the trouble to consult with a lawyer, who might have been able to give them a better judgment. Thus, since "objective good faith" cannot suffice as a defense to the

Petitioner's charge that the Government squandered its opportunity to secure a warrant, it is necessary for this Court to evaluate, by virtue of its own judgment, whether the reasons advanced by the Government for what was admittedly a deliberate bypass of the warrant process are reasonable.

B.

The Magistrate who ultimately issued a search warrant for Petitioner's car, once it had been seized without a warrant, erroneously refused to allow Petitioner's counsel to be heard in opposition to the issuance of the warrant.

Even the Government's entry into the warrant process, on March 31, 1977, was attended by unfairness to the Petitioner.

As noted above, the day after Petitioner was arrested and his car seized, the Government obtained a search warrant from a United States Magistrate, in the execution of which the gun, upon which the instant prosecution was founded, was discovered. During the proceeding in which the Magistrate was measuring the quantum of evidence presented by the Government to support its application for a search warrant, counsel for Petitioner went to the Magistrate's chambers and requested that he be heard on the pending application for the purpose of providing additional facts and arguments which would or might have prompted a different result on the application. The Magistrate, however, refused to hear defense counsel on the warrant application.

The refusal by a magistrate before whom an application for a search warrant is being presented to allow defense counsel to present additional, relevant facts and arguments constitutes a violation of Rule 12, Federal Rules of Criminal Procedure, and the Fourth, Fifth and Sixth Amendments to the United States Constitution, and although this Court has never considered the question, it should now so hold.

Petitioner does not take the position that a full adversary hearing is required in every proceeding on a search warrant application. The special facts in the present case required that defense counsel be allowed, at a minimum, the right to be heard before the decision was made. The magistrate had previously denied the Government's Motion to seize the Petitioner's car and has subsequently presided at Petitioner's arraignment on the related case. He was thus aware that the Government had custody of the car at the time of the warrant application. Thus, the evidence sought was completely secure and the Court already had authority over the Petitioner in the form of a bond. Nor did the Petitioner seek to do more than to be able to present argument and, if necessary, controverting facts.

Under these circumstances, there was no legitimate interest whatsoever to be served by the exclusion of the Petitioner and his attorney for the proceeding. There was no need for secrecy in the presentation of the Affidavit. Barring the Petitioner conferred no benefit upon an interest or party.

The purpose of the requirements of Rule 41, Federal Rules of Criminal Procedure, which *inter alia* imposes

rules upon the securing of a warrant, is primarily to deter future unlawful police conduct. *United States v. Calandra,* 414 US 338 (1974). Waiting until after that conduct has occurred to determine its legality certainly makes a less direct and more speculative contribution toward the goal of deterrence. Especially in circumstances as the present one in which there are no countervailing factors, an initial and more informed judgment as to the merits of the warrant request cannot but be beneficial to the entire process. Moreoever, it is the responsibility of the magistrate to take steps necessary to insure that he is not deceived. *United States v. Dunnings,* 425 F2d 836 (2d Cir 1969) *cert denied* 397 US 1002. Nothing could have assisted him in this responsibility more than, at a minimum, allowing defense counsel to be heard on the question before him.

The decision on whether to authorize a search of a citizen's property is so important in our scheme of justice that we limit the decision-making process to a neutral and detached magistrate. *Coolidge v. New Hampshire,* 403 US 443 (1971). A magistrate who examines a warrant request must be capable of determining whether probable cause is demonstrated but, equally importantly, he or she must be completely removed from the prosecutor or police to fulfill the requirement of detachment. *Shadwick v. City of Tampa,* 407 US 345 (1972). The appearance of justice and impartiality is strained where, even though the government has already seized the article it desires, that magistrate closes the door to defendant and makes a private decision only in the presence of the Government's agents. Certainly an independent judicial determination cannot be harmed in any way by hearing

both views. To the contrary, our system does not favor *ex parte* proceedings and allows them only grudgingly upon a showing of compelling necessity. No such necessity was present here. The care was securely in the custody of the Government, the evidence sought was not of an evanescent sort, and there was no function to be served by maintaining any secrecy to the proceeding.

On the other hand, although the Government could suffer no prejudice, the Petitioner stood considerably to lose by not being able to raise objections to the warrant until after its execution. Any post-Indictment remedy could not remove the inconvenience and disabilities which proceeded from the search. This is especially true in this case inasmuch as the Government has now dismantled part of the car. Also, a consideration of some of the particulars of the warrant at a time directly after the affidavits were prepared might have resulted in a more accurate construction of the circumstances, and caused the Magistrate to deny the warrant request.

Petitioner's research has not disclosed a case whose facts are similar to the present ones. It is well established, however, that a magistrate has jurisdiction to conduct an adversary hearing prior to the issuance of a search warrant. *United States v. Jacobs,* 513 F2d 564 (9th Cir 1974); *Perial Amusement Corp. v. Morse,* 482 F2d 515 (2d Cir 1973). Moreover, the Notes of the Advisory Committee on Rules - 1972 Amendment make clear that the issuance of a search warrant is to be made only after "careful" consideration as to whether there is probable cause. Issues as to the validity of the warrant should be raised at that time rather than relying upon the availability of a later motion to suppress.

Contrary to *Jacobs* and *Perial Amusement Corp.*, and contrary to the admonition of the Advisory Committee,

the magistrate refused even to exercise his discretion as to whether Petitioner should be allowed to be heard. Even if he had limited Petitioner to the presentation of argument rather than allowing a full hearing, Petitioner still had substantial grounds (as evidenced by other contentions made herein) which might have convinced the magistrate that the warrant should not issue.

Admittedly, it is not commonplace that a defendant seeks or receives the opportunity to be heard in opposition to the issuance of a search warrant. But pre-Indictment adversary proceedings under Rule 41(e) to determine the lawfulness of a search and seizure are recognized. *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F Supp 238 (SDNY 1971). *Cf. DiBella v. United States*, 369 US 121, 82 SCt 654 (1962). In view of the fact that the Government had custody of the automobile, defendant's attempted appearance before the magistrate was grounded upon the same procedures and remedies available to him under Rule 41(e). Indeed what was sought was considerably less intrusive upon the Government's investigation than would be a motion under Rule 41(e). Petitioner sought only to be heard on the validity of the search warrant. Under the circumstances, the magistrate, at the very least, was guilty of an abuse of discretion in refusing to consider whether defendant might be allowed to be heard prior to the issuance of the warrant and in refusing to allow Petitioner to be heard on that question.

II.

> The decision of the Court of Appeals is in conflict with the decisions of other circuits, and improperly validated clearly improper interference by the trial court in the jury's deliberations; the trial court's conduct, and the Court of Appeals' validation thereof, bespeak a need for guidance from this Court on the question of the circumstances under which, and to what lengths, supplemental jury instructions are proper.

It is the contention of the Petitioner herein that the totality of the Trial Court's conduct incident to the jury's deliberations was improperly intrusive and coercive of the jury, and violated both Rules 30 and 43 of the Federal Rules of Criminal Procedure as well as the standards well established by the case law as essential prophylaxis against improper interference with fair, even-handed and impartial jury deliberations.

The jury had been out for some two and one half days when it sent the following note to the Trial Judge:

> After careful review of all of the evidence presented to us, we cannot come to a unanimous decision. We request your guidance in the subsequent procedure.

Without consulting with counsel, the Trial Judge caused a note reading "Please continue deliberations" to be sent into the jury.

Certainly this *ex parte* communication with the jury, without consulting with counsel, and outside the presence of counsel and the Petitioner, was improper, *Shields v. United States*, 273 U.S. 583 (1957), although standing alone it would not constitute grounds for a serious claim of error.

What is significant, however, is that the action of the Trial Judge in sending this *ex parte* note signalled the beginning of a quite extraordinary sequence of events which, when viewed in their totality must be seen by this Court as improperly intrusive upon the jury's deliberations and coercive of the jury's verdict.

There is no question but that, although it certainly cannot be considered an "*Allen* charge" the Trial Court's note of July 21, 1977, was a supplemental instruction to the jury, although perhaps not unduly coercive. However, it is well established that in weighing whether supplemental instructions are coercive, it is proper to consider all of the circumstances surrounding the giving of the instructions. *Jenkins v. United States*, 380 US 445, 446, 85 SCt 1059 (1965); *United States v. Seawell*, 550 F2d 1159, 1163 (CA 9, 1977).

Shortly thereafter, and over objection, the trial judge called the jury into the courtroom, and asked them if they had yet arrived at a verdict. The Court then inquired of them if there was any "need for further instructions on the law," and discharged them for the evening with a request that they report back in the morning as to the answer to the question posed.

In the morning, in accordance with the Court's instructions of the night before, the foreman of the jury sent a note indicating that "The following items in law would help explain in greater depth, the definition of knowingly."

Petitioner objected strenuously to the totality of the procedure — in which the Judge solicited a request for instructions — and to any instruction which went beyond the instruction on "knowingly" which had already been given. Nonetheless, the Court read a proposed instruction to counsel, the specifics of which Petitioner objected to in detail, as being less than impartial, or going beyond the content of the Court's original instructions, adding elements of concepts which he had not been advised of prior to argument, and had not had an opportunity to argue regarding. Notwithstanding such objections, the Court proceeded to call the jury into the courtroom, inquire of them as to whether or not they were still unable to reach a verdict, and then read them both the supplemental instruction regarding the proofs, and the "*Allen* charge" which had previously been reviewed with counsel; approximately one hour later, the jury found the Petitioner guilty.

The proofs and argument in the case at bar took some eight hours to present to the jury. The jury's deliberations lasted approximately twenty-one hours — twenty before the Court's supplemental charges in court, and one after. The jury had deliberated long and hard over relatively short testimony, and given the jury's previous request for testimony it seems clear that their deliberations had focused on what was indeed the only issue in the case — whether the gun, which admittedly had traveled in interstate commerce, and which had admittedly been found in a secret compartment of what was admittedly a previously convicted Petitioner's automobile, had been proven beyond a reasonable doubt to have been placed there, or "knowingly possessed" by the Petitioner.

The only argument which had been made by defense counsel, and the entire thrust of all of the proofs which had been adduced by the Petitioner was to suggest that there was a reasonable possibility, consistent with the physical facts and the credible testimony (indeed, the defense did virtually nothing to attempt to impeach or discredit any of the testimony presented by the Government) that someone other than the Petitioner had placed the gun in the place where it had been found. Indeed, in responding to a defense objection to its charge advising the jury that "this is a simple case," the Court indicated that "this is one of the simplest cases that I have ever tried so far as a jury's obligations is concerned."

Against this background, it is, first of all, Petitioner's contention that the fact that the jury verdict came in so promptly after the Court's pattern of re-instruction is without more strong circumstantial evidence of coercion. *See, e.g., United States v. Petersen,* 513 F2d 1133, 1136 (CA 9, 1975).

The jury had not announced itself deadlocked lightly. Indeed, at the time that it made that announcement, it had already deliberated for about twice as long as it had taken the parties to present their proofs to them. Yet the trial judge, notwithstanding his previous declaration that "I don't like to get involved in jury deliberations," proceeded to:

1. Send, *ex parte,* a supplemental instruction to continue their deliberations, in the form of a tersely worded note.

2. Twice, in as many hours, called upon the jury to declare whether they had yet reached a verdict.

3. Indicated that he felt that the jury might be having a "problem" with its understanding of the law, and solicited a "request" for further instruction (on, not surprisingly, what had always been the only issue in the case).

4. Gave supplemental instructions on the core question of the case which went beyond what had originally been given to the jury, and included elements which counsel had not been advised of prior to argument (in violation of Rule 30, Federal Rules of Criminal Procedure) and which were in tone, substance, content and context, biased and less than impartial, and which tended to deprecate the Government's burden of proof.

5. Coupled its instructions on the substantive law with an immediate giving of an *"Allen* charge" which was coercive in tone, was coercively coupled with a supplemental instruction on the law, went beyond that which has been approved by this Circuit, and omitted limitations and cautions which have traditionally been constituted the second formal (and fourth informal) exhortation to a verdict which had been given in as many hours.

Dismayed the Petitioner may have been at the jury's prompt return of a guilty verdict, but surprised, the Court may rest assured, he was not.

The question of when, and how, a federal trial judge may respond a jury's difficulty in arriving at a unanimous verdict is one which has posed considerable difficulty, and one to which this Court has spoken only rarely.

Indeed, Petitioner's research has disclosed no cases speaking specifically to the propriety of a Trial Judge soliciting a "request" for further instructions on the substantive law. However, the Sixth Circuit, in *United States v. Barnhill*, 305 F2d 164, 165 (CA 6, 1962), recognized the difference between the effect of a trial judge giving a supplemental instruction (there, an *Allen* type charge, although the principle would seem to be the same), on its own initiative, and responding to a jury's indicating of difficulties in its deliberations. It is true that in the case at bar, the jury after lengthy deliberation announced itself deadlocked, and so, in a sense, initiated the series of events now complained of in this appeal. However, the jury did not express a difficulty with any aspect of the law or instructions at any time during its deliberations, but only responded to the Judge's earnest solicitations that they may have a "problem" with a response referring the Court to the only area of the case that was ever in issue in the first place. By that time the jury had already been instructed on at least one occasion to continue deliberating (the *ex parte* note), and been hied before the Bench, and asked again if they had been able to reach a verdict, and had it suggested to them that, first they may have been having a "problem," and, second, that they were to receive additional instruction in the morning. Obviously, the jury could only conclude that it was doing something wrong, or that it had some failure of understanding of the questions at issue. It did not apparently feel it had such a failure of understanding before the Court solicited the "request," but Petitioner would ask the Court how, in good conscience, the jury could have thought otherwise, after the judge had treated them the way he had.

The Court's response to the solicited "request" for instructions on the term "knowingly" not only went beyond the terms of the request — and included a further instruction (absent the usual and previously given cautionary predicate on circumstantial evidence) and on drawing inferences from testimony given — but also went well beyond anything which defense counsel had had an opportunity to argue, in plain contravention of the mandate of Rule 30, Federal Rules of Criminal Procedure; but the Trial Judge did not stop there — rather, he framed the supplemental substantive instruction in terms which were manifestly partial towards the prosecution, emphasizing what *did not* have to be proved, and barely touching on what did. Coming against the background of the Court's tersely worded note to continue deliberations, and its subsequent inquiry as to whether the jury had reached a verdict, an expression of perception that the jury may be having a "problem," and given in conjunction with the *Allen* type charge which it immediately preceded, the instruction could only have been taken by the jury as an exhortation to convict the defendant.

Analysis of the propriety of these instructions might well begin with this Court's admonition in *Bollenbach v. United States*, 326 US 607, 612 (1945), that "particularly in a criminal trial, the Judge's last word is apt to be the decisive word." However, analysis cannot end there. The fact is that although this Court's decision in *Allen v. United States*, 164 US 492 (1896), seems to have been taken as defining the "outer limits" of a Federal trial Court's involvement in a jury's deliberations, *United States v. Scott*, 547 F2d 334 (CA 6, 1977), Supreme Court precedents regarding other aspects of post-instructional interface between judge and jury are rather limited.

The Circuit Courts have taken a relatively restrictive view of the permissible intervention of a trial judge with the jury's deliberations. Thus, courts have been quick to strike down supplemental instructions which, while they may not be legally inaccurate, are so framed as to be prejudicial to a defendant, particularly in an especially sensitive context of a supplemental instruction. Thus, in *United States v. Carter*, 491 F2d 625, 633-634 (CA 5, 1974), the trial judge, in response to a request from the jury for further instruction on "circumstantial evidence," gave two illustrations indicating the difference between direct and circumstantial evidence, "both of which pointed toward the guilt of the accused," and further went beyond a circumstantial evidence instruction in advising the jury that it could infer guilt from possession or recently stolen property, unless such possession was satisfactorily explained. The Court noted:

> In the present case the instructions requested by the jury were not inherently favorable to either side; but the trial court went beyond the request to provide additional instructions strongly emphasizing the theory of the prosecution. 491 F2d *supra* at 634.

As in the case at bar, the Trial Court had omitted cautions originally given in its principal charge which might have served to rectify the perceived imbalance.

The Court noted, however, that the "words, phrases, and paragraphs of a judge's response to a question raised by the jury after a period of deliberation cannot reasonably be considered as merely additional language in the basic charge," 491 F2d *supra* at 633, and noted

this Court's ruling in *Bollenbach, supra*, that if a specific ruling on a vital issue is misleading in some fashion, the error is not cured "by a prior unexceptional and unilluminating abstract charge." (326 US *supra* at 612, 66 SCt *supra* at 405.)

The supplemental instructions in *Carter* were analytically quite similar to those complained of in the case at bar, in that they went beyond the jury's "request" for further instruction, and were not even-handed in their treatment of the apparently vital issue. The Court of Appeals reversed the defendant's conviction in *Carter* with the following admonition, which went unheeded in the case at bar, and against which the affirmance of the Petitioner's conviction stands in stark contrast:

> A trial judge must be accutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any single portion of the original charge. Thus, the Court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial. 491 F2d *supra* at 633.

Similarly, in *United States v. Miller*, 546 F2d 320, 324 (CA 9, 1976), the Ninth Circuit struck down a conviction which had followed hard on the heels of supplemental instructions on the area of witness credibility, but which had "somehow" omitted the cautionary instruction (previously given in the charge in chief) instructing the jury to weigh an accomplice's testimony with great care.

As the Court wrote in *Powell v. United States*, 347 F2d 156, 158 (CA 9, 1965):

> It is no answer to say that the supplemental instruction was correct so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues.

Conflict between instructions in chief and in supplemental instructions must be carefully considered, and the effect they might have on the jury's deliberations carefully weighed, *Tennant v. United States*, 407 F2d 52, 53 (CA 9, 1969), and in light of the great care which is appropriate in the context of supplemental instructions, it seems clear that instructions such as those in the case at bar, which, although perhaps technically accurate, emphasized to an inordinate degree what need not have been proved by the Government, are so terribly prejudicial as to, without more, require vacation of the conviction.

Even if the instructions had been more even-handed, they would still have been improper, inasmuch as they introduced into the case concepts and instructions which had not been given in the original instructions, and which Petitioner had not had an opportunity to argue, as Rule 30, Federal Rules of Criminal Procedure is designed to guarantee. Indeed, this deficiency was a strong basis of the Petitioner's objection to the giving of the instruction. Rule 30, of course, provides that prior to argument, "the Court shall inform counsel of its proposed action" in connection with the charge. Manifestly it is the purpose of the Rule that counsel may effectively plan their arguments to the jury. *United States v. Bass*, 425 F2d 161, 163 (CA 7, 1970). While it is

undoubtedly true that instructions different from those agreed upon prior to argument may be given if the argument of counsel is misleading or deceptive, *see e.g., United States v. Shirley*, 435 F2d 1076, 1078 (CA 7, 1970), nothing in defense counsel's argument in the case at bar justified the expansion of the Court's instructions represented by the supplemental charge given here.

Although it is the position of the Petitioner herein that the above instructions were so prejudicial in and of themselves, and so prejudicially framed, that, without more, reversal of his conviction is mandated, it seems clear that the prejudicial and coercive effect of the instructions was exacerbated by the context in which they were given.

The basic issue, of course, is that of coercion. As the Court of Appeals for the District of Columbia Circuit wrote in its exhaustive treatment of supplemental instructions in *United States v. Thomas*, 449 F2d 1177, 1181 (CA DC 1971) (*en banc*), "the line separating proper guidance from improper coercion is fine, and its precise location is not always clear." However, in the case at bar, as in *Thomas*, the Trial Court "urged a verdict, not only through Allen admonitions, but by other expressions to the jury as well." Indeed, the biased and exhortative aspects of the supplemental instructions already discussed were underscored and driven home both by the context in which the instructions were given, and by the fact that the Trial Judge followed these instructions immediately with an *Allen*-type charge, which was itself improperly coercive.

The supplemental instruction in the instant case went beyond the permissible limits of an *Allen*-type charge, as that decision of this Court has been developed by the Circuits.

The trial judge stressed the "importance" of the case to the parties, the "fact" (disputed on the record by Petitioner's counsel) that the case could not have been tried any better, and, most significantly, the expense which a retrial would involve.

It does not appear that the expense involved in trying a lawsuit was an element of the original charge originally approved by this Court in *Allen*. Indeed, the Sixth Circuit itself, has disapproved a charge in which the matter of the expense involved in a trial was mentioned only once, as distinguished as the charge in the case at bar, in which the Court twice refers to the expensive and burdensome nature of litigation — although in that case, it was held that defense counsel had invited the error. *United States v. Harris*, 391 F2d 348, 354 (CA 6, 1968):

> The Judge's statement in regard to the expense and burden of conducting a trial is an extension of the *Allen* charge and, in our judgment, a questionable extension, especially where this factor is unduly emphasized.

Accord, United States v. Burley, 460 F2d 998 (CA 3, 1972). Indeed, such references are properly held to be impermissible extensions of the *Allen* charge, since, as one commentator has noted: The expense of a new trial falls more heavily on the plaintiff or prosecution than on the defendant." Note, *On Instructing Deadlocked Juries*, 78 Yale Law Journal 100, 139 (1968).

Finally, the Court must consider the charge in the context in which it was given to the jury. *See United States v. Taylor*, 530 F2d 49, 51 (CA 5, 1976). It must be

remembered that the charge in question was the second exhortation to the jury to continue their deliberations (the first, of course, being the note sent by the Court the day before). Moreover, it came close upon the heels to inquiries as to whether or not the jury had been able to reach a verdict and, as well, upon the Court's suggestion that the jury had been having a "problem" understanding its instructions on the law, as well as a supplemental instruction on the substantive law which was, as argued above, itself coercive of a verdict against the Petitioner.

Although it is the position of the Petitioner that the supplemental instructions on the substantive law were inappropriate, coercive and erroneous, nonetheless the Trial Court might well have waited a bit to see if they would have the desired effect of breaking loose the jury's decisional impasse. This, Petitioner would contend, is especially true where, as here, they had already been urged to continue their deliberations. Adding the *Allen* charge to the other supplemental instructions, Petitioner submits, was a little bit like using a sledge hammer to swat a fly. The decision of the Ninth Circuit Court of Appeals in *United States v. Seawell*, 550 F2d 1159, 1163 (CA 9, 1977), is, defendant submits, instructive, if not dispositive with respect to this last point. In *Seawell*, the Court held that it is reversible error to repeat an *Allen* charge in a federal prosecution after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction. While it is true that the Court only gave the "*Allen* charge" in the case at bar once, it would seem to

the Petitioner, and it must appear to the Court, that the other supplemental instruction, at least when taken with the rest of the Court's previous handling of the jury's decisional difficulties, was at least in coercive effect, the equivalent of having given an *Allen* charge once before. Accordingly, the giving of the *Allen* charge at the point in time that it was given, was, under the circumstances of the case, premature, and that even had the charge been properly confined to the permissible limits of such an instruction, the very fact that it was given was unduly and improperly coercive. *Cf. United States v. Contreras,* 463 F2d 773 (CA 9, 1972).

All in all, the conduct of the trial court in the case at bar went far beyond the level of involvement in jury deliberations which is, or ought to be, ordinarily permitted of a Federal trial judge. The Sixth Circuit court of appeals, while expressing some reservations about the wisdom of the course of conduct pursued by the trial judge, acted in marked contrast to the general trend of decisional authority among the several Circuits in affirming the propriety of that conduct. This Court should grant certiorari both to rectify the injustice manifested in the instant case, and to establish standards to guide other federal trial judges in their handling of the delicate situations often presented when a jury has difficulty arriving at a unanimous verdict.

III.

The decision of the Court of Appeals is in direct conflict with the principles established in this Court's decision in *Marshall* v *United States,* 360 U.S. 310 (1959), in that the Court of Appeals erroneously affirmed the trial judge's denial of Petitioner's challenges for cause to trial jurors who admitted both unfavorable attitudes toward Petitioner, and the possession of extrajudicially-acquired facts about specific allegedly criminal acts of the petitioner, unconnected with the charge for which he was on trial, and about which proof would not have been admissible.

Almost all of the prospective jurors examined in selecting the jury in the case at bar were familiar with the Petitioner's surname — thirty out of thirty-three.

Although seven of the jurors interviewed did not attach any connection to their familiarity with the name, and one juror felt that she had heard the name in a good context, more than two-thirds of the jurors associated some negative connotation with the name. The connection most often made with the name was with "organized crime," although three jurors associated the name with the discovery of a gun, three jurors connected the name with a previous prosecution, four jurors connected the name with the disappearance of James R. Hoffa, and a number of other jurors connected the name only generally with crime, the underground, or people who wore "black hats." Petitioner raised six challenges for cause, and the Court denied all six.

The factual basis underlying the three challenges for cause which framed the basis for this argument on appeal may be briefly summarized:

> *Juror Glantz* - Mr. Glantz indicated that the name Giacalone had a connotation in his mind of "something to do with crime;" juror Glantz further indicated that he "was more or less under the assumption" that Mr. Giacalone was associated with criminal endeavors as a matter of profession, trade or calling; however, the Court sustained a Government objection to a line of questioning which began to explore whether or not Mr. Glantz would embark upon his duties as a juror with that assumption. The juror indicated, in response to a question as to whether his assumptions about the defendant would have an effect on his thinking in the case with the response: "Well, I would listen to the evidence. I think I would."
>
> *Juror Noffert* - Mr. Noffert indicated, in response to questions about whatever associations he might make with the name Giacalone that he had previously been employed at a finance company, servicing outstanding loans, and that one of his customers was making payments on thirteen loans, one of whom was to Mr. Giacalone. He further indicated that he associated the name through pre-trial publicity with organized crime and he indicated further that he suspected at the time that he came across the loan transaction that he had referred to at first, that there was some connection between that transaction (which seemed abnormal to him) with some kind of organized criminal activity.

> *Juror Gray* - Ms. Gray, when asked what her association might be with the name Giacalone, could not be specific about where she associated the name, but did indicate that she had a "bad connotation, a bad feeling about the name;" that she thinks of the name as being "involved with crime, or organized crime, and I guess, for that reason, it leaves a bad feeling with me." She indicated that she felt that Mr. Giacalone had a bad reputation, and that it was true that he was involved in organized crime; she volunteered the term "Mafia" in that connection. Finally, Ms. Gray indicated that she would not want to meet Mr. Giacalone in a social setting, and that if she learned that he was buying the house next to her, she would "probably get a little worried."

Of course, all of these jurors at one point or another, indicated that they could be fair and impartial, could base their decision only upon evidence, instructions and the other proprieties of a trial, and volunteered no reason why they felt they should not be seated as jurors.

As this Court wrote in *Patterson v. Colorado*, 205 US 454, 462 (1907):

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Since it is impossible to operate with mathematical assurance and precision in the arena of human thought and behavior, "our system of law has always

endeavored to prevent even the *probability* of unfairness." *In re Murchison*, 349 US 133, 136 (1955) (emphasis in original). Certainly, a trial judge has a great deal of discretion in ruling on the issue of prejudice resulting from pre-trial publicity, but, as the Court noted in *Silverthorne v. United States*, 400 F2d 627, 637 (CA 9, 1968), "discretion is not a substitute for duty."

It strongly appears, when the totality of the *voir dire* in the case at bar is examined, that there is an underlying current and pattern of prejudice against the Petitioner in the Eastern District of Michigan; as noted above more than half the jurors examined associated the Petitioner's name (with varying degrees of specificity) with negative, anti-social things. Although it is not the position of the Petitioner that he was the victim of "such a pattern of deep and bitter prejudice," *Ervin v. Dowd*, 366 US 717 (1961), has made a fair trial in the community impossible, nonetheless, it seems clear enough that with the pervasive negative community sentiment against which virtually a majority of the jurors came to the trial, the possibility of prejudice on the part of a particular jury, or arising from particular facts or knowledge in the possession of an individual juror, was one to which the Trial Court should have been especially sensitive, because it was one which posed a particularly real and imminent danger.

Each of the three jurors felt that they had specific information about the Petitioner which would not have been admissible upon the trial of the cause, which was gleaned from extrajudicial sources, and which was of course terribly prejudicial to the Petitioner. Ms. Gray, for example, in addition to harboring a basic animus toward or fear of the Petitioner, felt that it was true that

he was associated with "the Mafia"; Mr. Glantz "assumed" that the defendant was a professional criminal; and of course, in the case of Mr. Noffert, the problem was especially accute, because he felt he had knowledge of a crime or some criminal activity, which he felt Petitioner had been involved in and with which, of course, Petitioner has never been charged, much less convicted.

The basic principles of law applicable to a situation such as the one posed by the case at bar are clear enough.

In *Marshall v. United States*, 360 US 310 (1959), the Court reversed a conviction of a defendant in a criminal case where it was shown that a "substantial number of jurors" had read newspaper articles during the trial which contained accounts of the defendant's previous convictions and incarcerations. The Court wrote:

> We have here the exposure of jurors to information of a character which the Trial Judge ruled was so prejudicial it could not be directly offerred as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. *Cf. Michaelson v. United States*, 335 US 469, 475, 69 SCt 213, 218, 93 LEd 168 [1948]. It may indeed be greater for it is not then tempered by protective procedures. 360 US *supra* at 312 - 313, 79 SCt *supra* at 1173.

Michaelson, cited by the Court, of course, stands generally for the proposition neither character evidence nor specific previous bad acts of the defendant, are admissible in the prosecution's case in chief, "even

though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." 335 US *supra* at 475. The Court continued:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. 335 US *supra* at 475-476, 69 SCt *supra* at 218.

In the case at bar, each of the three jurors here in question felt themselves to be in possession of exactly the kind of information which might "logically be persuasive" that the Petitioner herein was "by propensity a probable perpetrator of the crime charged.

The principle outlined in *Marshall* is recently explicated by the Fifth Circuit Court of Appeals in *United States v. Williams*, —— F2d ——, 22 Cr L Rptr 2521, 2522 (CA 5, 2-27-78). In *Williams*, the Court cogently observed that exposure to information regarding a defendant's prior criminal acts may be "perhaps even more damaging" than exposure to information regarding a defendant's prior conviction. The Court noted however, that:

> Reversal is not required in every case in which a newstory containing facts inadmissible in evidence reaches the jury. The inadmissibility of the newsreports' contents is only one factor to be considered, and the crucial issue is the degree and pervasiveness of the prejudicial influence. *Id.*

The pervasiveness of the prejudicial influence in the case at bar is, Petitioner submits, amply illustrated above.

The Fifth Circuit noted as well in *Williams* that a juror's assurance that he or she could be fair can hardly be conclusive of the question: "The effective exposure to extrajudicial reports on a juror's deliberations may be substantial even though it is not perceived by the juror himself, and a juror's good faith cannot counter this effect."

Such an observation, of course, is in accordance both with common sense and with the American Bar Association's Standards Relating to Fair Trial and Free Press. It is, for example, noted in the comments thereto (Approved Draft, 1968, at page 64):

> First, the processes by which beliefs are formed and adhered to, and their effect on perception, appear to take place to a large extent below the level of consciousness. Thus a juror's good faith efforts to lay these beliefs aside cannot be determinative. Second, even exposure to *accurate* information can cause difficulty, because unless it is complete in every way, with all the necessary nuances and shadings, it seems likely to instill a belief that will be hard to shake and that will color the juror's perceptions of the evidence adduced in Court. (emphasis is original)

With respect to jurors who have been exposed to and remember reports of incriminating matters "that may be inadmissible in evidence, or particularly inflammatory materials," the Commentary notes that such a juror "should be subject to challenge for cause whether or not he admits to an opinion." Standards, *supra*, at 137.

The decision of the Sixth Circuit in the case at bar stands in marked conflict both with the teachings of this Court in such cases as *Marshall, supra,* and the American Bar Association Standards, as well as authorities from other circuits, such as is exemplified by *United States* v *Williams, supra.* Accordingly, a writ of certiorari should issue, and the Petitioner's conviction be reversed.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the substantial questions herein posed.

Respectfully submitted,

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Dated: February 20, 1979

APPENDIX A

OPINION

(United States Court of Appeals
For the Sixth Circuit)

(United States of America, *Plaintiff-Appellee,* v. Vito Giacalone, *Defendant-Appellant.*—No. 78-5055).

(Decided and Filed December 18, 1978.)

Before: Phillips, Chief Judge; Celebrezze and Engel, Circuit Judges.

ENGEL, Circuit Judge. Vito Giacalone was found guilty in a jury trial of unlawful possession and receipt of a firearm by one having been convicted of a felony, in violation of 18 U.S.C. § 1202(a)(1) (Appendix) (1976). On direct appeal he challenges the procedures which produced the weapon in question, complains that the trial judge committed reversible error in refusing to excuse three jurors for cause, and finally complains that the trial judge unfairly supplemented the charge to the jury, thereby coercing it into convicting him. We affirm.

I.

THE SEARCH AND SEIZURE

The incident which resulted in Giacalone's indictment and ultimate conviction here arose when Giacalone was arrested upon a federal warrant charging him with operation of an illegal numbers business and a related conspiracy charge. Giacalone was arrested by federal authorities at 4:41 p.m., March 29, 1977, as he was

entering, or about to enter,[1] his Cadillac automobile which was then parked in the parking lot of the Southfield Athletic Club, a private club near Detroit. At the time of the arrest, the FBI agents seized but did not search Giacalone's automobile. There was outstanding an application by the government for a seizure warrant under 18 U.S.C. § 1955(d) upon the theory that the automobile was subject to forfeiture because of its alleged use in the gambling operation. The search warrant had not been issued at the time of Giacalone's arrest and the seizure of the car, and apparently it was ultimately later denied by a magistrate. A few minutes after Giacalone was arrested, Special Agent Donald C. Bretnell, while inside the Southfield Athletic Club, spotted Dominic Vivio, recognized by him as Mr. Giacalone's driver, engaged in a telephone conversation. At that time he overheard Vivio state his concern that if the police searched the car, "they [might] find the goddamn thing in there." A confidential informant, "FBI-2", likewise overheard Vivio tell the defendant Giacalone, "[w]e've got to get that gun out of there right now." The preceding January the FBI had been informed by another confidential informant, "FBI-1", that he "had overheard a conversation between Vito Giacalone and an unidentified white male during December 1976 where Giacalone stated he, Giacalone, had recently installed a

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[1] The evidence varies somewhat, and the district court did not make an express finding concerning Giacalone's precise location at the time of the arrest. In view of our decision to uphold the seizure on other grounds, we need not address whether the detention and search of the automobile may be sanctioned as incident to Giacalone's arrest. *See generally United States* v. *Lewis*, 504 F. 2d 92, 103-04 (6th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

secret compartment in his Cadillac." FBI-1 added corroborating details concerning the car's description and license number. A conversation involving Giacalone which FBI-2 had overheard in February, 1977 also squared with what FBI-1 had stated concerning the December, 1976 conversation.[2] On the basis of the foregoing information and further noting Giacalone's status as a convicted felon, the FBI prepared an affidavit for presentation to the district court in its application for a search warrant.[3] Meanwhile the automobile was taken into possession and transported from the Southfield Athletic Club to the FBI garage where it was secured until the warrant was issued. The search took place the following day, March 30, pursuant to the warrant. In a secret compartment installed beneath the dashboard of the Cadillac the FBI discovered a Smith and Wesson pistol.

While appellant urges that the affidavit for the search warrant was insufficient, an assertion which we find without merit, his primary complaint is that the information which was incorporated in the affidavit and provided the probable cause was itself illegally obtained because it was the product of the warrantless seizure and detention of Giacalone's automobile which had occurred at the time of his arrest on March 29.

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[2] The affidavit presented to the court in the search warrant application recited a sufficient basis for the reliability of FBI-1 and FBI-2, noting and describing previous occasions on which they had provided accurate information to law enforcement officials.

[3] Apparently, the government had elected to first seek a warrant based upon the forfeiture statute, 18 U.S.C. § 1955(d), rather than the felon-in-possession charge in order to avoid revelation of its informants, notably FBI-1.

The temporary detention of Giacalone's car at the time of his arrest, while awaiting the issuance of a search warrant, was certainly not unreasonable, even though the forfeiture warrant which was originally sought was not issued. Coupled with the information contained in the search warrant affidavit, the government's evidence at the suppression hearing sufficed to establish that at the time the automobile was first detained in the parking lot of the Southfield Athletic Club the government had probable cause to believe it contained the hidden firearm.[4] In the meantime, of course, the agents became possessed of further hard evidence which would and did, indeed, support the issuance of a search warrant. Their detention meanwhile of the automobile, whether in the parking lot or, as here, at a police compound following its removal, represented a reasonable and minimal intrusion justified by the exigent circumstances.[5]

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[4] Testifying at the suppression hearing, Special Agent Bretnell indicated that he had read an informant report which FBI-1 had submitted to the Bureau prior to March 29, 1977. The report revealed that Giacalone himself told FBI-1 that there was a gun in his car. This information was not, however, incorporated in the search warrant affidavit and we have not considered it in our review of the warrant, although it has been considered in judging the warrantless detention of the Cadillac on March 29.

[5] *Cf. Chambers* v. *Maroney*, 399 U.S. 42 (1970) (An automobile seized in a parking lot was taken to a station house and searched). "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 52. In view of our conclusion that the FBI had probable cause at the time it detained Giacalone's car, we need not address the government's claim that the mere detention of an automobile pending the issuance of a warrant is subject to less demanding strictures than a seizure and search. *See generally Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).

Nor can we accept appellant's argument that the warrantless detention of the Cadillac, although supported by probable cause and exigency, was nonetheless unreasonable because it represented an effort to avoid prior review by a magistrate and thus frustrate the warrant requirement. *See generally United States* v. *Chuke*, 554 F. 2d 260, 263-64 (6th Cir. 1977). In our judgment, the government's conduct represents scrupulous adherence to the standards of reasonableness which the Supreme Court has determined are mandated under the Fourth Amendment in conjunction with the seizure and search of automobiles.

The facts of this case fully suggest the propriety of the exception to the warrant requirement in *Carroll* v. *United States*, 267 U.S. 132 (1925), in which the Court distinguishes searches of stable structures such as dwelling houses from the "search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153. The automobile exception in *Carroll* has been repeatedly reaffirmed by the Supreme Court and in *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), the Supreme Court further noted that the vehicle's mobility is not the sole touchstone, since warrantless searches have been upheld "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." *Cady* v. *Dombrowski*, 413 U.S. 433, 441-42 (1973). A further justification for this exception to the warrant requirement lies in the diminished expectation of privacy pertaining to an automobile. *Chadwick, supra*, 433 U.S. at 12-13.

Finally, appellant's assertion that somehow the alleged unlawful physical seizure of the automobile unlawfully produced the evidence which was incorporated in the application for a search warrant is without merit. The officer's seizure of the automobile, wrongful or not, produced none of the information concerning the presence of a gun in the car upon which the valid search warrant was later issued. The gun cannot, therefore, be said to be the fruit of any alleged illegality in detaining the car. Good police work, not an unlawful seizure, produced the evidence which led to the search warrant and ultimately to the seizure of the pistol.

II.

THE JURY VOIR DIRE

The trial court conducted a separate *voir dire* of the venire to determine the possibility of disqualification due to prejudice, with each of the prospective jurors being examined individually and out of the hearing of the other jurors. Defense counsel was permitted to question the jurors directly after the court had concluded its questioning. Giacalone asserts that the trial court erred in failing to grant his motion to strike for cause three prospective jurors, Glantz, Noffert and Gray. When the challenge for cause was denied, Giacalone exercised his peremptory challenges to excuse the jurors so that none served on the jury which ultimately ruled on his guilt. At the same time Giacalone asserts that the court's refusal to strike the jurors for cause prejudiced him by forcing him to

exercise his peremptory challenges, diminishing the number of such challenges which he was otherwise entitled under the law to employ.

In each case the cause asserted was the acknowledgement by the juror that he had heard of Giacalone or his surname prior to the trial, and had associated it in one way or the other with illegal or improper activities. Thus, Gantz thought that he had heard the name Giacalone as far back as ten or twelve years previously, possibly as the name of a former owner of a store in which he had worked, and that the name generally in his mind had "something to do with crime, I guess." Juror Noffert had raised his hand when the court asked whether any jurors had heard the name of Vito Giacalone before. Mr. Noffert informed the court and defense counsel that he had worked for a finance company eight or nine years previously and that one of the men receiving the payments on one of the loans, he believed, was Giacalone. Noffert also indicated that he had read Giacalone's name in the papers and in articles concerning organized crime. Under questioning by counsel for the defendant, Noffert had indicated that at the time he had considered the loan activity abnormal, but in answer to whether he thought there was "something shady or something funny about those loans", Noffert indicated that he had no idea since the transaction had taken place prior to his employment by the company and that he had merely serviced the loan some years ago. Juror Gray indicated that she had heard the name on the news and on radio and that she had "a bad connotation, a bad feeling, about the name. But, I couldn't say a specific case. . . . Well, I think of the

name involved with crime, or organized crime, and I guess, for that reason, it leaves a bad feeling with me."[6]

Further questioning by the court, however, made it clear that each juror was willing to put aside any prior opinion or knowledge he or she might have concerning the defendant and to judge the question of his guilt or innocence solely on the basis of the facts adduced at trial. No juror indicated any knowledge of the incident involved in the trial. While we believe it would probably have been wiser to have excused the jurors for cause, we cannot say that the failure to do so was an abuse of the discretion entrusted to the court in such matters, and it is clear to us that the amount of knowledge possessed by the jurors was not sufficient to have demanded invariably that they be excused for cause. No predisposition to convict is evident in the answers and in fact the very candor of the jurors, taken with skillful handling by the trial court, may well have produced in them a greater receptivity to accord Giacalone a fair trial than might have resulted had they had no information at all or not been questioned.

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[6] It is possible that some adverse association might have stemmed from an identification of the name Giacalone with Vito's brother Anthony, whose conviction has recently been affirmed by this court in *United States* v. *Giacalone*, 574 F. 2d 328 (6th Cir.), *cert. denied*, 47 U.S.L.W. 3202 (U.S. October 3, 1978); *see also United States* v. *Giacalone*, 541 F. 2d 508 (6th Cir. 1976) (en banc) (motion for return of a blood-stained automobile belonging to Vito's nephew, Joseph Giacalone, and seized in connection with an FBI investigation into the disappearance of former Teamsters' president James Hoffa). No motion for change of venue on that account was made, nor was any knowledge of the legal difficulties of defendant's relatives evident upon the record here.

The facts here are not unlike those in *Murphy* v. *Florida*, 421 U.S. 794 (1975), wherein the Supreme Court upheld the petitioner's conviction by a jury composed in part of persons who had some acquaintance with the robbery for which Murphy had been indicted and of others who had indicated their knowledge of Murphy's past crimes. Analyzing the publicity evident in the record, the Supreme Court stated:

> The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. [717,] 722 [(1961)]. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
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> > "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, at 723.
>
> At the same time, the juror's assurance that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Ibid.*

421 U.S. at 799-800. The degree of potential prejudice evident in the record here is considerably less than

that shown in *Murphy*. In *Murphy*, as here, "[t]he *voir dire* . . . indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside." *Id.* at 800.

And in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), the Supreme Court observed:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under *Murphy*, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere . . . utterly corrupted by press coverage," *Murphy* v. *Florida*, *supra*, at 798.

432 U.S. at 303. It is true that *Irvin*, *Murphy* and *Dobbert* applied a constitutional standard to state prosecutions and that we are involved here with the proper application of federal rules and of our broader supervisory powers over the trial of a defendant in a federal criminal prosecution. *Cf. Murphy* v. *Florida*,

supra, 421 U.S. at 803-04 (Burger, C.J., concurring in the judgment). Nevertheless, the standards of *Murphy* v. *Florida* and *Irvin* v. *Dowd* have been followed by our court in federal prosecutions. Relying upon *Murphy* and *Irvin*, we held in *United States* v. *Gay*, 522 F.2d 429 (6th Cir. 1975):

> If a juror can lay aside any preconceptions about the case and try it solely on the evidence presented in court, it is not error to fail to dismiss such a juror for cause.

Id, at 432. *See also United States* ex rel. *Stickler* v. *Tehan*, 365 F.2d 199 (6th Cir. 1966), *cert. denied*, 386 U.S. 992 (1967), and *United States* v. *Mitchell*, 556 F.2d 371 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977).

There having been no abuse of discretion in failing to strike the jurors for cause and there being no challenge to the jurors who actually served, there is even less merit to the suggestion that in some indistinct way, Giacalone's exhaustion of his peremptory challenges and his inability to exercise more in some way entitles him to a new trial. The trial court enjoys a superior perspective as to which alleged prejudices are real and which are imagined, and its judgment must ordinarily be respected.

In some instances all jurors, or all intelligent jurors at least, will have had some exposure through the news media either to the defendant's reputation or to the offense with which he is charged. *See, e.g., United States* v. *Haldeman*, 559 F. 2d 31, 59-71 (D.C. Cir. 1976) (en banc), *cert. denied*, 431 U.S. 933 (1977); *United States* v. *Johnson*, No. 77-5315, et al. (6th Cir., decided September 28, 1978). There must necessarily be a broad

margin for discretion in the trial court to determine challenges for cause. *Mitchell, supra*, 556 F.2d at 379. It is for precisely this reason that peremptory challenges are provided, not as a matter of constitutional requirement, but rather as an additional safeguard even where the danger of prejudice is not of constitutional proportions. That Giacalone was able to take advantage of the cushion provided by the exercise of peremptory challenges reflects not a denial of justice but the achievement of it under good rules designed for the purpose.

III.

JURY INSTRUCTIONS

Giacalone's final allegation of error concerns the actions of the trial court after the jury had retired to deliberate upon a verdict. After two and one-half days of deliberations, the jury delivered a note to the court which stated:

> After careful review of all of the evidence presented to us, we cannot come to a unanimous decision. We request your guidance in the subsequent procedure.

The inquiry came at a time when neither the defense counsel nor the defendant was available and the court, five to ten minutes after the inquiry was received, delivered a note to the jury which read:

> Please continue your deliberations.
> Judge Joiner

Giacalone claims that this *ex parte* conduct on the part of the district judge violated the requirement of Rule 43, Fed. R. Crim. P., that "[t]he defendant shall be

present . . . at every stage of the trial" and that it was in violation of *Shields* v. *United States*, 273 U.S. 583 (1927), and more recently, of *Rogers* v. *United States*, 422 U.S. 35 (1975). *See also United States* v. *United States Gypsum Co.*, — U.S. —, 46 U.S.L.W. 4937, 4947-48 (U.S., June 29, 1978). Unlike the facts in those cases, however, the jury did not solicit and the court did not give any *ex parte* instructions about the merits of the case or the manner of the jury's deliberations. Although it may have been technically in error for the trial judge to have made even this limited response to the jury, the error was not under the circumstances prejudicial. As we held in *United States* v. *Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974), the rule requiring that a defendant be present at all stages of the trial must be considered with Rule 52(a), Fed. R. Crim. P., providing that harmless error is to be disregarded, citing *United States* v. *Gradsky*, 434 F.2d 880 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971), 409 U.S. 894 (1972); and *Yates* v. *United States*, 418 F.2d 1228 (6th Cir. 1969). Thus we held that a forbidden communication will not always be reversible and that the standard is whether there is "any reasonable possibility of prejudice." 489 F.2d at 8, *quoting Wade* v. *United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971). We cannot agree with appellant that the note to the jury was "tersely worded" or "coercive" and indeed, appellant concedes that taken alone, any error would not be reversible. He urges us, however, to consider it in the context of other events which later occurred in the course of the jury's deliberations.

Potentially more serious than the court's *ex parte* communication is Giacalone's assertion that the trial court exceeded its permissible bounds when it delivered supplemental instructions in response to the

jury's request for further assistance on the definition of the term "knowingly." The request for instructions came after the court, on its own initiative, had inquired of the jury whether there were any questions which it might have about law, a questionable procedure, in our judgment, since the jury had not up to that point indicated that it had such questions. Upon receipt of the inquiry, the trial judge drafted instructions which he made available to counsel for comment and to which Giacalone objected.[7]

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[7]

THE COURT: You have asked for a further definition of the word, knowingly, as used in the instruction. I am giving you this instruction to try to be of assistance to you pursuant to your request.

The law of this case requires that before you can find the Defendant guilty of the crime charged, you must find, beyond a reasonable doubt, that the Defendant, knowingly, received, or possessed a firearm.

Knowingly, as used in this instance, is required to be shown to insure that no one will be convicted because of mistake, or accident, or other innocent reason. It is a requirement that the Defendant had knowledge of his receiving, or possessing the firearm. This does not include intent to violate the law, that is not required, nor does it require knowledge that there was such a law, or knowledge that the firearm traveled in interstate commece. The knowledge that is required is that of receiving or possessing the firearm.

How do you determine whether or not such knowledge exists?

Proof of Defendant's knowledge of possession of a firearm, which you must remember must be proved beyond a reasonable doubt, does not require direct testimony that the Defendant held it in his hand, or used it, to show knowledge of possession. Knowledge of possession can be proved in other ways, and from circumstantial evidence.

(Cont'd. on next page.)

Appellant's counsel objects not so much to the instructions given as to the fact that they appeared to exceed the scope of the request made by the jury, and that they deviated from the definition of "knowingly" as earlier given by the trial judge, thus depriving the defense counsel of an opportunity to argue the new language in his closing remarks to the jury.

Particularly useful is the following language of the Fifth Circuit in *United States* v. *Carter*, 491 F.2d 625, 633 (5th Cir. 1974):

> When after an hour and 40 minutes of deliberation a jury returns, not with a verdict, but with a request for clarification of a particular point of law, it must be recognized that the jury has been unable to reach a decision on the basis

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(Fn. 7 — Cont'd.)

You look at all the evidence, direct and circumstantial. You determine whether there is evidence that directly bears on this question, and you determine whether there is evidence of other circumstances that, indirectly, bears on this question. In doing all of this, you are to consider only the evidence in the case, but, in your consideration of the evidence, you are not limited by the bold [sic] statements of the witnesses. You are not limited to what you have seen, or heard, in the courtroom. You are permitted to draw from the facts produced, such reasonable inferences as you feel are justified in light of experience.

Knowledge ordinarily may not be proved, directly, because there is no way of fathoming or scrutinizing the human mind. But, you may infer the Defendant's knowledge from the surrounding circumstances. You may consider all facts and circumstances in evidence which bear on the issue of knowledge.

Unless you find knowledge of possession as outlined herein, beyond a reasonable doubt, you should acquit the Defendant. If you find that knowledge has been so proved, you should consider the other instructions of the case.

> of all it has heard up until that time. Under those circumstances a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any single portion of the original charge. Thus, the court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial.

Subjecting the judge's instructions to close scrutiny because of the highly sensitive nature of his role at that stage of the trial, we conclude that the trial judge's comments met the high standard of balance and fairness necessary to assure defendant a fair trial. Defendant's counsel objected to giving any instruction at all. He did not indicate any specific dissatisfaction with the language employed nor request that the court add to or amend the instruction proposed and given, although he now claims that the instructions should have reflected certain cautions to the jury on the use of circumstantial evidence.

We cannot agree with appellant's assertion that the supplemental instructions given violated Rule 30, Fed. R. Crim. P.,[8] because they went beyond the instructions originally submitted to the jury. Giacalone argues that

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[8] Rule 30 provides in part:

> The court shall inform counsel of its proposed action upon the requests [for instructions] prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

Rule 30 permits counsel to effectively plan closing presentations to the jury, *United States* v. *Bass*, 425 F.2d 161, 163 (7th Cir. 1970), and therefore effectively precludes a court from giving any instruction which has not already been given in its original charge and the substance of which has not been known to defense counsel prior to closing arguments.

Our court has recognized the duty of the trial court to clear up uncertainties which the jury brings to the court's attention. *United States* v. *Rowan*, 518 F.2d 685, 693 (6th Cir.), *cert. denied*, 423 U.S. 949 (1975). We do not believe that Rule 30 precludes any supplemental instructions except those which simply recite what was previously given; were that so, the instructions would be merely repetitive and not supplemental. We prefer a rule which measures the propriety of a supplemental instruction not by whether it is a verbatim repetition but instead by whether it fairly responds to the jury's inquiry without creating a prejudice which Rule 30 was designed to avoid. In other words, the decision is committed to the sound discretion of the trial judge and our review is limited to determining whether that discretion was abused, taking into account the sensitive nature of the judge's responsibility at this stage of the trial and the duty of the trial judge to provide impartial and effective guidance on the law for the jury to follow in its deliberations. Under such circumstances we do not believe that the trial court's discretion was abused.

Finally, appellant complains of the fact that the supplemental instructions given by the court were followed closely by a so-called *Allen* charge. *See Allen* v. *United States*, 164 U.S. 492 (1896). While it is true

that we have held that "[a]ny variation upon the precise language approved in *Allen* imperils the validity of the trial," *United States* v. *Scott*, 547 F.2d 334, 337 (6th Cir. 1977),[9] we observe that the trial judge's statement roughly follows the instruction contained in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 18.14 (3d ed. 1977), an instruction implicitly approved by the Supreme Court in *Kawakita* v. *United States*, 343 U.S. 717 (1952).[10] We further note that while defense counsel generally resisted the delivery of an *Allen* charge, no specific objection was made to the language employed except in one particular and that in this regard the trial court, in the charge actually given, acceded to the language proposed by defense counsel.[11]

For the first time on appeal, however, defense counsel complains that the charge given unduly

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[9] In fact, the *Allen* opinion did not quote the instructions which it was approving, although it noted that the instructions had been taken literally from *Commonwealth* v. *Tuey*, 62 Mass. (8 Cush.) 1 (1851). *See* 164 U.S. at 501-02; *Pugliano* v. *United States*, 348 F. 2d 902, 903-04 (1st Cir.), *cert. denied*, 382 U.S. 939 (1965).

[10] Although the opinion in *Kawakita* did not expressly address the propriety of the *Allen* charge delivered by the trial court, it noted that "[o]ther alleged errors . . . are either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice . . . ." 343 U.S. at 744. One such claim of error discussed at length by the Ninth Circuit involved the *Allen* charge. *See* 190 F. 2d at 521-28.

[11] The trial court acquiesced in defense counsel's suggestion to tell the jury that "[i]t is important that [this lawsuit] be *disposed of*" rather than *"decided."* *See United States* v. *Harris*, 391 F. 2d 348, 356-57 (6th Cir.), *cert. denied*, 393 U.S. 874 (1968) (disapproving the word "decided" and noting a preference for the phrase "disposed of").

emphasized any expense involved to the parties in trying the lawsuit.[12] It is true that in *United States* v. *Harris*, 391 F.2d 348, 354 (6th Cir.), *cert. denied*, 393 U.S. 874 (1968), our court found "questionable" the undue emphasis which the trial court placed upon the expense and burden of conducting a trial. At the same time, while *Harris* noted disapproval of the language, it did not determine whether such language constituted reversible error and we hold it is not so here, at least in the absence of any specific objection thereto at the time. Under the circumstances we do not believe that the *Allen* charge as given unduly emphasized expense of the trial, nor was it coercive.

Giacalone also objects to that portion of the charge in which the trial judge indicated that the parties "have presented their case as well as they can" and that "[i]t does not appear that another trial could be more exhaustively, or more completely tried as has been this trial."[13] Again, the language objected to was substantially that which is approved of in Devitt & Blackmar and derived from *Kawakita, supra*. This objection was not made to the district court and we decline to address the claim for the first time on appeal. It certainly was not a

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[12] Thus, the trial court instructed:

> A trial of a lawsuit is an expensive process and is burdensome upon the litigants. All parties have been here, and have prepared for trial, and have spent time before you, and have presented their case as well as they can.
>
> Like all cases, the problem must be disposed of at some time. So far as I can tell, there seems to be no reason why another trial would not be equally as expensive or burdensome as the trial you have been through. It does not appear that another trial could be more exhaustively, or more completely tried as has been this trial.

[13] *See* note 12 *supra*.

matter of plain error, if error at all. No unique circumstances in the trial which might have made the instruction error here are pointed out, and we find none. The trial appears to have been well conducted by both sides, even though each might now claim it could make a more effective presentation on retrial.

Finally, Giacalone invites us to hold that the charges delivered by the court were coercive because of the relatively short period of time which elapsed between the time the jury received the supplementary instruction and the time it returned the verdict, relying upon *United States* v. *Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975). In *Harris, supra*, our court suggested that the brief interval between the giving of the *Allen* charge and the return of a verdict may demonstrate the coercive effect of the charge. 391 F.2d at 356. The ABA Standards Relating to Trial by Jury (Approved Draft 1968), while generally critical of *Allen* charges, dispute the logic of the view that an *Allen* charge may or may not be considered coercive depending upon the speed with which a verdict is reached. "[I]t is difficult to accept a rule which in effect tells a judge that his instruction may be reversible error depending upon what happens after he has given it." ABA Standards, *supra*, Commentary to § 5.4(b) at 154. The speed with which a jury may reach a verdict following the giving of the charge cannot be considered in determining whether the given charge was improper as coercive when given, although it might tend to indicate whether an instruction deemed improper was or was not harmless. We find no reversible error in the instructions complained of.

Within each of the three foregoing general areas of complaint, appellant has interposed other assertions of error and arguments concerning them, all of which we have reviewed but found to be without merit.

Affirmed.

APPENDIX B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed January 22, 1979)

(United States of America, Plaintiff-Appellee v. Vito Giacalone, Defendant-Appellant)

Before: CELEBREEZE and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

The petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk